IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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JANINE CARBONE, :
on behalf of plaintiff and a class, :
: 2:15-cv-05190-JS-G
Plaintiff, :
:
vs. :
:
CALIBER HOME LOANS, INC.; :
:
Defendant. :

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

In accordance with this Court's Memorandum and Order of September 30, 2016, Plaintiff filed her First Amended Complaint on October 31, 2016 (Dkt No. 23). Plaintiff has attempted to satisfy the Court's concerns to the extent possible and has tendered a pleading for purposes of appellate review.

II. STATEMENT OF FACTS

Plaintiff Janine Carbone is an individual who resides in a single-family home which she owns (with her husband) in Nassau County, New York. (First Amended Complaint, ("FAC") ¶5) Ms. Carbone and her husband are both on title and signed the mortgage; Mr. Carbone signed the note. (FAC ¶15).

Defendant Caliber is a Delaware corporation with offices in Texas. (FAC ¶7) Caliber is a "special servicer" of residential mortgage loans and seeks rating as such from rating agencies such as Fitch and S&P in order to obtain "special servicing" business. Caliber advertises its ratings on its web site. (FAC ¶8) In mortgage industry jargon, a "special servicer" is a servicer that specializes in handling delinquent and defaulted mortgage loans. (FAC ¶9)

According to S&P's rating opinion, Caliber serviced $32 billion in residential loans as of Aug. 31, 2013. As of June 20, 2013, when the total balance was less, it was servicing over 92,000 loans. (FAC ¶10) Caliber regular acquires servicing of loans that are delinquent or in default at the time of such acquisition. On information and belief, it has over 4500 such loans. (FAC ¶11) Caliber acquires servicing of portfolios or groups of similar loans, rather than individual loans. (FAC ¶12)

Caliber uses the mails and telephone system to collect such debts. (FAC ¶13) It is a debt collector as defined in 15 U.S.C. §1692a(6). (FAC ¶14)

Plaintiff's residential mortgage loan is serviced by Caliber. The loan is secured by plaintiff's residence and was obtained for personal, family or household purposes, namely housing. (FAC ¶15).

Pursuant to the terms of the mortgage plaintiff is referred to as "Borrower". (FAC ¶16) Pursuant to the terms of the mortgage the Borrower [plaintiff] has the following obligations to pay money: to make monthly payments for taxes and insurance, to pay charges assessments and claims, to maintain hazard insurance or property insurance, maintenance and protection of the property, and to fulfill lease obligations. (FAC ¶17) Additionally, as a mortgagor plaintiff has the equity of redemption which is the right to redeem the property by paying the principal, interests and costs owed on the Note. (FAC ¶18)

Caliber obtained servicing of plaintiff's loan in late 2014. FAC Ex. C is the notice of transfer of servicing, dated November 10, 2014. (FAC ¶20) At the time, the loan was delinquent. (FAC ¶21) FAC Ex. C expressly refers to "collecting your mortgage loan payments from you," states Caliber "will collect your payments going forward," and specifies where to "[s]end all payments".

On or about December 18, 2014, Caliber sent plaintiff FAC Ex. D. (FAC ¶22) FAC Ex. D is a form document, filled out in a standardized manner. (FAC ¶23) FAC Ex. D states that "you could lose your home" but "You can cure this default by making the payment of $97619.70 by 03/23/15" and urges Ms. Carbone to obtain counseling to "explore the possibility of modifying your loan, establishing an easier payment plan for you", and "this is an attempt by a debt collector to collect a debt and any information obtained will be used for that purpose."

No "notice of debt" was sent to plaintiff until June 10, 2015. (FAC ¶27 and Ex. E) FAC Ex. E states that "The above referenced loan is in default because you have failed to pay the required monthly installments as you promised to do when you signed the Note and Mortgage" and "You may cure your default on or before July 15, 2015 by sending the total amount of $118,102.80" or entering into a "loan modification or repayment agreement," that "If this default is not cured, Caliber will report the defaulted loan to any appropriate credit-reporting agency," and "you must send a certified check, money order or cashier's check."

FAC Ex. E alters the statutory language of the FDCPA "notice of debt" to state, "If you do notify us of a dispute, we will obtain verification of the debt and mail it to you", and "Also, upon your request, within thirty (30) days, we will provide you with the name and address of the original creditor if different from the current creditor." (FAC ¶28) The statute requires that such requests be in writing to preserve the consumer's rights. Defendant eliminates the writing requirement from its notice. (FAC ¶29). Compliance with the letter will not preserve the consumer's FDCPA rights.

Plaintiff alleges in Count I that neither FAC Ex. C nor any other document sent to plaintiff before or within 5 days after FAC Ex. D contains the disclosures required by 15 U.S.C. §1692g. Count II alleges that FAC Ex. E misstates the disclosures required by 15 U.S.C. §1692g and is misleading in violation of 15 U.S.C. §§1692e and 1692e(10).

III. STANDARD OF DECISION

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a "short and plain statement of the claim showing that the plaintiff is entitled to relief." This "short and plain statement" must be enough " 'to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-557 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. The Court did "not require heightened fact pleading of specifics," but did demand that the complaint to contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. See also *George v. Smith*, 507 F.3d 605, 608 (7th Cir.2007).

"Even after *Twombly*, courts must still approach motions under Rule 12(b)(6) by 'constru[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor.' " *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2008). "We review a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Fait v. Regions Financial Corp.*, 655 F.3d 105, 109 (2d Cir. 2011).

Moreover, a plaintiff "is not required to prove [his] case in [his] complaint, even in the post-*Twombly* and *Iqbal* environment: the Federal Rules still follow a notice-pleading regime, and they do not 'impose a probability requirement on the plaintiffs.'" *Motorola. Inc. v. Lemko Corp.*, No. 08 C 5427, 2010 WL 960348, at *3 (N.D. Ill. Mar. 15, 2010), quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Rather, a plaintiff need only provide sufficient plausible facts to put the defendant on notice of his claims. *Brooks*, 578 F.3d at 581. "A plaintiff need not prove her case in the complaint," but merely show facts "beyond simple conjecture that the plaintiff is entitled to relief." *Wilson v. AT&T Inc.*, 1:09cv58, 2010 WL 987737 at *1 (S.D. Ind. Mar. 12, 2010). "[T]he changes that *Twombly* and its progeny have brought to the standard of review for Rule 12 motions have not changed the liberal notice pleading standard of the federal rules." *Wilson*, 2010 WL 987737 at *5.

There is no requirement that every fact that must ultimately be proven be alleged in a complaint:

> We have distinguished notice pleading from evidentiary proof by stressing that "[f]acts that substantiate the claim ultimately must be put into evidence, but the rule 'plaintiff needs to prove Fact Y' does not imply 'plaintiff must allege Fact Y at the outset.' " *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 923-924 (7th Cir. 2007). Further, we have admonished that "[a]ny district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain ...' should stop and think: What rule of law requires a complaint to contain that allegation?" *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (emphasis in original).

Lang v. TCF National Bank, 249 Fed.Appx. 464, 466 (7th Cir. Sept. 21, 2007). *Accord, Huber v. Trans Union, LLC*, 4:11cv139-SEB-DML, 2012 WL 3045686, *4 (S.D.Ind., July 25, 2012); *Hornbeck Offshore Transp., LLC v. United States*, 563 F.Supp.2d 205, 216 (D.D.C. 2008).

"[A] plaintiff is not required to plead facts in the complaint to anticipate and defeat affirmative defenses." Dismissal on the basis of an affirmative defense is appropriate only in the rare case where a plaintiff's complaint admits all of the elements of an affirmative defense. *Independent Trust Corp. v. Stewart Information Services Corp.*, 665 F.3d 930, 935 (7th Cir.

2012).

Defendants are not entitled to offer alternative explanations for their conduct on a motion to dismiss. *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[I]f a plaintiff's claim is plausible, the availability of other explanations—even more likely explanations—does not bar the door to discovery"); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleading stage."); *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 46 (1st Cir. 2013) (same).

IV. PLAINTIFF'S CLAIM UNDER 15 U.S.C. §1692e DOES NOT REQUIRE THAT SHE BE A "CONSUMER" AT ALL.

Defendant, relying on this Court's decision, asserts that the FDCPA does not apply because plaintiff merely signed the mortgage, obligating her interest in her home as security for a debt, but is not personally liable on the note, and is therefore not a "consumer." 15 U.S.C. §1692(a)(3) defines "consumer" as "any natural person obligated or allegedly obligated to pay any debt."

Initially, Count II of the FAC alleges violation of 15 U.S.C. §1692e as well as §1692g. While §1692g requires that a notice be sent to a "consumer," neither §1692e nor the civil remedies provision of the FDCPA, §1692k, require that one be a consumer. Section 1692e states that "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt", and is not limited to "consumers" except for §1692e(11). Similarly, §1692k confers a right of action on any "person" against whom a violation is committed.

Thus, if, in the course of collecting money from A, who is personally obligated to pay a debt, defendant commits an FDCPA violation with respect to B, who is neither personally obligated nor the owner of any collateral securing the debt, B has a valid claim under any FDCPA provision which applies to a "person" rather than a "consumer." *Rawlinson v. Law*

Office of William M. Rudow, LLC, 460 Fed. Appx. 254 (4th Cir. 2012) (family member who was named in replevin action because she might have possession of or control over collateral, but who had not signed contract, and did not have an ownership interest in collateral, could sue; "the district court erred in holding that non-debtors, or those with no financial interest in the collateral at issue, may not bring suit under the FDCPA.").

V. PLAINTIFF IS A CONSUMER BECAUSE (1) SHE ALLEGEDLY OWED A DEBT, (2) THE MORTGAGE IMPOSES PERSONAL FINANCIAL OBLIGATIONS, AND (3) ONE OBLIGATED TO PAY A NONRECOURSE OBLIGATION IN ORDER TO AVOID LOSS OF PROPERTY IS A "CONSUMER"

Defendant's "consumer" argument is based on three faulty premises. First, defendant ignores the fact that "consumer" is defined to include any natural person obligated or "allegedly obligated" to pay any debt. Second, the mortgage defined plaintiff as a Borrower and set forth a series of obligations such as making monthly payment for taxes and insurance, paying charges, assessments and claims, maintaining hazard insurance or property insurance and maintenance and protection of the property. Third, defendant assumes that "obligated" in the definition of "consumer" must mean personally obligated, as opposed to being the owner of valuable collateral which will be lost if the debt is not paid, thereby "obligating" the owner to pay money to prevent loss of her home. However, that qualification is not in the FDCPA.

A. PLAINTIFF IS A PERSON "ALLEGEDLY" OBLIGATED TO PAY

Defendant's correspondence to plaintiff repeatedly asks her for money. FAC Ex. C expressly refers to "collecting your mortgage loan payments from you," states Caliber "will collect your payments going forward," and specifies where to "[s]end all payments". FAC Ex. D states that "you could lose your home" but "You can cure this default by making the payment of $97619.70 by 03/23/15," urges Ms. Carbone to obtain counseling to "explore the possibility of modifying your loan" or "establishing an easier payment plan for you", and states that "this is an attempt by a debt collector to collect a debt and any information obtained will be used for that purpose." FAC Ex. E states that "The above referenced loan is in default because you have failed to pay the required monthly installments as you promised to do when you signed the Note and Mortgage" and "You may cure your default on or before July 15, 2015 by sending the total amount of $ 118,102.80" or entering into a "loan modification or repayment agreement," that "If this default is not cured, Caliber will report the defaulted loan to any appropriate credit-reporting agency," and "you must send a certified check, money order or cashier's check."

Clearly, Caliber claimed that Ms. Carbone had to pay money to it. She is "allegedly" obligated to pay, and is therefore a "consumer" entitled to sue. *Dunham v. Portfolio Recovery Associates, LLC*, 663 F.3d 997 (8th Cir. 2011) (person dunned in error has same right to sue as actual debtor); *Isaac v. RMB, Inc.*, 2:12cv2030, 2014 WL 3566069 (N.D.Ala., July 18, 2014) (same); *Davis v. Midland Funding, LLC*, 41 F.Supp.3d 919, 923 (E.D.Cal., Aug. 7, 2014) ("a debt collector that attempts to collect an obligation from the wrong person is subject to the FDCPA"). Caliber cannot avoid liability for its violations by stating that its allegation that she owed money was wrong – in effect, confessing to a §1692e violation (falsely claiming that she was obligated to pay) and arguing that the action should therefore be dismissed.

B. THE MORTGAGE DID IMPOSE PERSONAL FINANCIAL OBLIGATIONS ON PLAINTIFF

Plaintiff's residential mortgage loan is serviced by Caliber and the loan is secured by plaintiff's residence. Pursuant to the terms of the mortgage plaintiff has a series of obligations to pay money: to make monthly payments for taxes and insurance; to pay charges, assessments and claims; to maintain hazard insurance or property insurance; maintenance and protection of the property; and to fulfill lease obligations. Additionally, as a mortgagor plaintiff has the equity of redemption which is the right to redeem the property by paying the principal, interest and costs owed on the Note. The transaction is therefore an "obligation or alleged obligation of a consumer to pay money . . . ." 15 U.S.C. §1692a(5).

C. NONRECOURSE OBLIGATIONS ARE COVERED BY THE FDCPA

1. AN FDCPA "DEBT" INCLUDES, BUT IS BROADER THAN, EXTENSIONS OF CONSUMER CREDIT SUBJECT TO THE TRUTH IN LENDING ACT AND REGULATION Z.

The FDCPA definition of "debt" includes but is broader than the definition of consumer credit subject to the Truth in Lending Act ("TILA") and Regulation Z. *Romea v. Heiberger & Associates*, 163 F.3d 111, 114-15 (2d Cir. 1998) (FDCPA applies to either extension of credit or breach of a contractual payment obligation in consumer-purpose transaction). As the court pointed out in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327 (7th Cir. 1997), early versions of the FDCPA directly tied "debt" to the TILA definition of credit, defining debt as "any obligation arising out of a transaction in which *credit is offered or extended to an individual, and* the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes".

In the course of enacting the FDCPA, the italicized language was deleted, broadening the definition. "Congress was aware of discord on whether 'debt' should be defined restrictively to include only credit transactions, but rejected this restriction in the text it adopted." *Bass, supra.* Since Congress thus selected an FDCPA definition of "debt" that started out to be identical to that of "credit" under TILA, but deliberately was made broader, it is not permissible to narrow it by construction and exclude from the coverage of the FDCPA anything considered to be an extension of consumer credit under TILA.

2. NONRECOURSE CONSUMER CREDIT IS EXPRESSLY SUBJECT TO TILA AND REGULATION Z, AND IS DESCRIBED THEREIN AS IMPOSING A "LEGAL OBLIGATION" THAT MUST BE DISCLOSED.

Nonrecourse consumer credit – most notably pawn transactions and reverse mortgages – is expressly subject to TILA and Regulation Z. Furthermore, nonrecourse consumer credit is described in TILA and Regulation Z (and elsewhere) as imposing a "legal obligation." This ties directly into the definition of "debt" in 15 U.S.C. §1692a(5), "any obligation or alleged obligation of a consumer to pay money . . . ."

The term "obligation" is used to include non-recourse situations in the various titles of the Consumer Credit Protection Act, of which the FDCPA is one. For example, TILA disclosures must be made for a reverse mortgage (also known as a "home equity conversion mortgage"), which by definition imposes no personal obligation. 15 U.S.C. §1648, 12 C.F.R. part 1026, Supp. I, ¶17(c)(14)(iii). TILA disclosures are also required for a pawn transaction, which by definition also imposes no personal obligation. 12 C.F.R. part 1026, Supp. I, ¶17(c)(18).

TILA disclosures must be made even though TILA requires disclosure of the "legal obligation," 12 C.F.R. §1026.17(c); 12 C.F.R. part 1026, Supp. I, ¶17(c)(1), and reverse mortgages and pawn transactions are by definition non-recourse. 15 U.S.C. §1602(cc), 12 C.F.R. part 1026, Supp. I, ¶¶ 33(a) (reverse mortgage), and 18 (pawn).

Using defendant's logic, the non-recourse nature of such transactions would mean that there is no "legal obligation" subject to disclosure. However, TILA clearly requires disclosures – the creditor must disclose the terms which must be met by the consumer to avoid loss of the collateral. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261 (9th Cir. 1993) (pawn transactions are subject to TILA even though there is no personal liability).

Related federal statutes likewise refer to nonrecourse transactions as an "obligation." 12 U.S.C. §1715z-20 (dealing with insurance of reverse mortgages and referring to their "principal obligation").

Similarly, a non-recourse obligation is an "obligation" in common English usage. *Black's Law Dictionary* (9th Ed. 2009), "Nonrecourse" ("Of or relating to an ***obligation*** that can be satisfied only out of the collateral securing the obligation and not out of the debtor's other assets.") (emphasis added).

In *Lebowitz v. Commissioner of Internal Revenue*, 917 F.2d 1314, 1319-20 (2d Cir. 1990), the court described a non-recourse debt as an "obligation" for tax purposes where the value of the property securing the debt exceeded its amount: "[A] nonrecourse debt that does not exceed the value of the security is genuine, because, if the taxpayer defaults, he will lose an asset worth more than the amount of the debt. . . . The fact that the timing of payments to be made on the note was set according to the production of coal does not detract from our conclusion that payment on the note was not contingent. The proposition that a debt is contingent if it is secured solely by the proceeds to be derived from the collateral does not imply that an otherwise genuine obligation will be invalid, solely because payments are to be made at the points at which the collateral produces income. Here, as long as there was sufficient coal in the ground to secure payment of the note at the time the note was executed, the only contingency would have been that the price of coal might have gone down, as in fact it did, or gone up, as it did not. Such a 'contingency' does not render the obligation illusory, regardless of how payments on the note happen to have been timed."

Generally, mortgage loans and pawn transactions involve the lending of amounts that are less than the expected value of the collateral, so that there is a very real "obligation" to pay the debt.

3. DECISIONS AND ADMINISTRATIVE INTERPRETATIONS APPLY THE FDCPA TO NONRECOURSE DEBT

Several courts have held that the FDCPA applies to attempts to enforce "reverse mortgages," which as noted above are by definition nonrecourse transactions – only the property is liable. *Caceres v. McCalla Raymer,* 755 F.3d 1299 (11th Cir. 2014); *Hall v. Nationstar Mortgage, LLC*, 13-6563 and 14-2257, 2015 WL 4071581 (E.D.Pa., July 6, 2015); *Alhassid v. Bank of America, N.A.*, 60 F.Supp.3d 1302, 1324-25 (S.D.Fla. 2014).

Other nonrecourse situations have also been held subject to the FDCPA. The Federal Trade Commission has determined that attempts to resolve debts of decedents with surviving family members are subject to the FDCPA as long as the ***decedent*** incurred the debt as part of a consumer-purpose transaction, even if the family members that are subject of the collection activities have no personal obligation to repay the debts. *Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts,* p. 6 n. 10, p. 12 n. 26

(July 27, 2011) (found at www.ftc.gov/policy/federal-register- notices/statement-policy-regarding-communications-connection-collection). The FTC determined that the FDCPA applies if the decedent entered into a consensual transaction that personally required payment of money and was subject to the FDCPA, and that the protection of the statute continues after death and extinction of any personal obligation to pay – the only obligation to pay is from the decedent's estate assets. *See Kinkade v. Estate Information Services, LLC*, 11cv4787, 2012 WL 4511397 (E.D.N.Y., Sept. 28, 2012), following the FTC statement. *A fortiori,* the present situation is subject to the FDCPA – here, someone (plaintiff's husband) entered into a consensual transaction that personally requires payment of money and is subject to the FDCPA, plaintiff is obligated to make payments to avoid loss of collateral, and plaintiff is obligated to directly make various types of payments and expenditures under the terms of the mortgage.

In *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004), the Seventh Circuit held that the FDCPA applied to an attempt to obtain payment of a debt discharged in bankruptcy, extinguishing any personal obligation.

Defendant's contrary argument "would create a loophole in the FDCPA. A big one." *Reese v. Ellis, Painter, Ratterree & Adams LLP*, 678 F.3d 1211, 1217-18 (11th Cir. 2012). The loophole is not supported by the language of the FDCPA, and is contrary to both the legal and ordinary meaning of the words used. Defendant's request to create it should be rejected.

Defendant cites three district court cases in support of its argument, all involving *pro se* plaintiffs. One, *Sain v. HSBC Mortgage Services, Inc.*, 4:08-2856, 2010 WL 2902741 (D.S.C., June 10, 2010), held that *pro se* plaintiff Jolly was not a consumer in connection with a mortgage transaction when he signed ***neither*** the note nor the mortgage. Plaintiff Jolly had signed a "contract for deed" for the purchase of the property from plaintiff Sain, who had signed the note and mortgage. (2010 WL 2902741, *3). The case does not address the issue before this Court.

In *King v. IB Property Holdings Acquisition*, 635 F.Supp.2d 651 (E.D.Mich. 2009), the *pro se* plaintiff was the son of the sole individual who had signed the note and mortgage. The father had allegedly quitclaimed the property to the son. The court held that this was insufficient connection with the transaction to make the son a "consumer." This case is not in point.

The last case, *Coleman v. Indymac Venture, LLC*, 966 F.Supp.2d 759 (W.D.Tenn. 2013), is the only one involving a person who had signed a mortgage but not the note. The plaintiff sued an original creditor, involved with the loan from the outset, and the court correctly dismissed the FDCPA claim because the FDCPA defendant was not a "debt collector." After stating that it was not required to "ferret out the strongest cause of action on behalf of pro se litigants" (966 F.Supp.2d at 768), it added the thought that "Coleman is not a 'consumer,'" because he "is not personally obligated to pay the sums secured by this Security Instrument." (966 F.Supp.2d at 771) The docket sheet indicates that the *pro se* plaintiff did not file a brief, and the court appears to have been unaware of the authority regarding the treatment of non-recourse debt under the TILA and FDCPA. Its *dicta* should not be followed.

Defendant's argument produces absurd results. On defendant's reading, the FDCPA (1) protects someone who is personally obligated to pay $50, (2) does not protect someone who has a $250,000 home that will be sold if they don't pay a $50,000 loan because they aren't personally liable for any deficiency, even though the amount at stake is 1,000 times greater and under common English usage the person is "obligated" to pay $50,000, (3) but does protect the same mortgagor if he signed the note as well as the mortgage, even if the value of the collateral is such that the actual likelihood of a deficiency is zero. A "construction" of a consumer protection statute that produces such results, when the statutory language is consistent with coverage in all three cases, and there is ample authority for coverage, is inappropriate.

In light of all of the above, plaintiff is a "consumer" within the FDCPA and entitled to sue under §1692g as well as §1692e.

VI. THE ENFORCEMENT OF MORTGAGE LOANS THROUGH FORECLOSURE IS SUBJECT TO THE FDCPA

Defendant next argues that foreclosure of a mortgage is not "debt collection." Defendant makes this argument even though (1) FAC Ex. C expressly refers to "collecting your mortgage loan payments from you," states Caliber "will collect your payments going forward," and specifies where to "[s]end all payments", (2) FAC Ex. D states that "you could lose your home" but "You can cure this default by making the payment of $97619.70 by 03/23/15" and urges Ms. Carbone to obtain counseling to "explore the possibility of modifying your loan, establishing an easier payment plan for you", and "this is an attempt by a debt collector to collect a debt and any information obtained will be used for that purpose," (3) FAC Ex. E states that "The above referenced loan is in default because you have failed to pay the required monthly installments as you promised to do when you signed the Note and Mortgage" and "You may cure your default on or before July 15, 2015 by sending the total amount of $ 118,102.80" or entering into a "loan modification or repayment agreement," that "If this default is not cured, Caliber will report the defaulted loan to any appropriate credit-reporting agency," and "you must send a certified check, money order or cashier's check."

Most Courts of Appeals to have addressed the issue has held that foreclosure of a residential mortgage is "debt collection" subject to the FDCPA because its principal objective is to coerce the homeowner to pay money, and that lawyers and others regularly engaging in mortgage and lien foreclosures are subject to the FDCPA.

Third Circuit: *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 233-36 (3d Cir. 2005) (FDCPA applies to collection of overdue water and sewer obligations via lien filed against consumer's house; also relied on letters requesting payment);.

Fourth Circuit: *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (FDCPA applies to actions of attorneys hired to initiate non-judicial foreclosure; concerned over the "enormous loophole" that would result otherwise, but also relying on direct requests for payment to conclude that FDCPA applies); *Rawlinson v. Law Office of William M. Rudow, LLC*, 460 Fed. Appx. 254 (4th Cir. 2012) (replevin action is covered by FDCPA, both with respect to the debtor and a family member named as a defendant because " Rudow Law explained that it had named Rawlinson as a defendant in the replevin action because she stated that Moore lived with her and, therefore, "she would also have reasonably been in possession of, or known the location of, the subject vehicle.").

Fifth Circuit: *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006)("a party who satisfies §1692a(6)'s general definition of a 'debt collector' is a debt collector for purposes of the entire FDCPA even when enforcing security interests").

Sixth Circuit: *Wallace v. Washington Mut. Bank, F.A.*, 683 F.3d 323 (6th Cir. 2012); *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453, 455 (6th Cir. 2013) ("we hold that mortgage foreclosure is debt collection under the Act").

Seventh Circuit: *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010) (request for information to evaluate modification covered even if there is no "explicit demand for payment.").

Eleventh Circuit: *Reese v. Ellis, Painter, Ratterree & Adams LLP*, 678 F.3d 1211, 1217-18 (11th Cir. 2012) (noting that a contrary "rule would create a loophole in the FDCPA. A big one. In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of §1692e by giving notice of foreclosure on the secured interest. The practical result would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't. A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest. A 'debt' is still a 'debt' even if it is secured."); *Birster v. American Home Mortgage Servicing, Inc.*, 11-13574, 2012 U.S. App. LEXIS 14660 (11th Cir., July 18, 2012) (same).

A state Supreme Court has agreed, *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992), as have many district court decisions. *Hooks v. Forman Holt Eliades & Ravin LLC*, 11 Civ. 2767, 2015 WL 5333513, *10 (S.D.N.Y., Sept. 14, 2015).

The contrary lower court decisions were soundly rejected in *Glazer v. Chase Home*

Finance, LLC, 704 F.3d 453 (6th Cir. 2013), where the court addressed the matter at length.

> The FDCPA speaks in terms of debt collection. For example, to be liable under the statute's substantive provisions, a debt collector's targeted conduct must have been taken "in connection with the collection of any debt," e.g., 15 U.S.C. §§1692c(a)-(b), 1692d, 1692e, 1692g, or in order "to collect any debt," id. § 1692f. In addition, to be a "debt collector" under the Act, one must either (1) have as his or her principal business purpose "the collection of any debts" or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another." Id. § 1692a(6). Despite the Act's pivotal use of the concept, however, it does not define debt collection. While the concept may seem straightforward enough, confusion has arisen on the question whether mortgage foreclosure is debt collection under the Act. We have not addressed the issue. Nor has the Consumer Financial Protection Bureau offered an authoritative interpretation on the matter. See 15 U.S.C. § 1692l (d). Other courts have taken varying approaches on the issue. . . . (704 F.3d at 459-60)

After noting that the contrary decisions rely on "the premise that the enforcement of a security interest, which is precisely what mortgage foreclosure is, is not debt collection," the court held that "we find this approach unpersuasive and therefore decline to follow it." (704 F.3d at 460) It explained:

> Unfortunately, the FDCPA does not define "debt collection," and its definition of "debt collector" sheds little light, for it speaks in terms of debt collection. See 15 U.S.C. § 1692a(6); cf. *In re Settlement Facility Dow Corning Trust,* 628 F.3d 769, 773 (6th Cir.2010) (noting that a definition containing the defined term is not likely to be helpful). But the statute does offer guideposts. It defines the word "debt," for instance, which is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1692a(5). The focus on the underlying transaction indicates that whether an obligation is a "debt" depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred. . . .
>
> In addition, the Act's substantive provisions indicate that debt collection is performed through either "communication," id. § 1692c, "conduct," id. § 1692d, or "means," id. §§ 1692e, 1692f. These broad words suggest a broad view of what the Act considers collection. Nothing in these provisions cabins their applicability to collection efforts not legal in nature. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 292 (1995) (holding that "a lawyer who 'regularly,' through litigation, tries to collect consumer debts" is a "debt collector" under the Act). Foreclosure's legal nature, therefore, does not prevent if from being debt collection.
>
> Furthermore, in the words of one law dictionary: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." Black's Law Dictionary 263 (6th ed.1990). The Supreme Court relied on this passage when it declared the following in a case concerning the Act's definition of "debt collector": "In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Heintz*, 514 U.S. at 294 (emphasis added). Thus, if a purpose of an

> activity taken in relation to a debt is to "obtain payment" of the debt, the activity is properly considered debt collection. Nothing in this approach prevents mortgage foreclosure activity from constituting debt collection under the Act. *See Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo.1992) (explaining that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"). . . . (704 F.3d at 460-61)

The Sixth Circuit concluded that all mortgage foreclosures are intended to obtain payment on a debt – a proposition that is obvious from the contents of FAC Exs. A-C in the instant case:

> In fact, every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e, forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt). As one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment. See Eric M. Marshall, *Note, The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices*, 94 Minn. L.Rev. 1269, 1297–98 (2010). Accordingly, mortgage foreclosure is debt collection under the FDCPA.
>
> Other provisions in the Act reinforce this view. The Act nowhere excludes from its reach foreclosure or the enforcement of security interests generally. In fact, certain provisions affirmatively suggest that such activity is debt collection. Section 1692f prohibits "debt collectors" from using "unfair or unconscionable means" to "collect any debt." After stating this general prohibition, the section sets forth a non-exhaustive list of specific activities prohibited thereunder, one of which is "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property" if, e.g., "there is no present right to possession of the property claimed as collateral through an enforceable security interest[.]" 15 U.S.C. § 1692f(6)(A). Foreclosure in some states is carried out in just this way—through "nonjudicial action," the result of which is to "effect dispossession" of the secured property. See, e.g., Mich. Comp. Laws § 600.3204 (authorizing foreclosure by advertisement only if no lawsuit has been filed to recover the underlying debt); Tenn.Code Ann. § 35–5–101 (permitting foreclosure by advertisement). The example's presence within a provision that prohibits unfair means to "collect or attempt to collect any debt" suggests that mortgage foreclosure is a "means" to collect a debt. . . . (704 F.3d at 461-2)
>
> Our holding today is supported by decisions from our sister circuits. . . .
>
> Courts that hold that mortgage foreclosure is not debt collection offer different reasons for this view. Some reason that the FDCPA is concerned only with preventing abuse in the process of collecting funds from a debtor, and that foreclosure is distinct from this process because "payment of funds is not the object of the foreclosure action." *Hulse*, 195 F.Supp.2d at 1204. We disagree. There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money. (704 F.3d at 462-3)

The Sixth Circuit noted that §1692i, which regulates the venue of mortgage foreclosures and only applies to a "debt collector," would otherwise allow in rem actions to be brought in remote venues:

> Consider also § 1692i. This section requires a debt collector bringing a legal action against a consumer "to enforce an interest in real property securing the consumer's obligation"—e.g., a mortgage foreclosure action—to file in the judicial district where the property is located. 15 U.S.C. § 1692i(a)(1). Although the provision itself does not speak in terms of debt collection, it applies only to "debt collectors" as defined in the first sentence of the definition, id. § 1692a(6), which does speak in terms of debt collection. This suggests that filing any type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act. (704 F.3d at 462)

Accord, *Kaltenbach v. Richards, supra*, 464 F.3d 524, 528 (5th Cir. 2006). The Sixth Circuit also rejected the notion that the separate reference in §1692a(6) to persons whose principal business is the enforcement of security interests means that foreclosures are outside the general definition of "debt collector":

> Some courts that hold mortgage foreclosure to be outside the Act rely principally on the definition of "debt collector." After defining a "debt collector" as one whose principal business purpose is the "collection of any debts" or who "regularly" collect debts, the definition's third sentence states: "For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6). One who satisfies the first sentence is a debt collector for all sections of the Act, but one satisfying only the third sentence is a "debt collector" limited to § 1692f(6) (concerning non-judicial repossession abuses). *See Kaltenbach*, 464 F.3d at 528; *Montgomery,* 346 F.3d at 699–701. Therefore, these courts reason, "if the enforcement of a security interest was synonymous with debt collection, the third sentence would be surplusage because any business with a principal purpose of enforcing security interests would also have the principal purpose of collecting debts." *Gray v. Four Oak Court Ass'n, Inc.*, 580 F.Supp.2d 883, 888 (D.Minn.2008). To avoid this result, these courts conclude that the enforcement of a security interest, including mortgage foreclosure, cannot be debt collection. Id.
>
> We reject this reading of the statute. The third sentence in the definition does not except from debt collection the enforcement of security interests; it simply "make[s] clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned." *Piper,* 396 F.3d at 236; *see Shapiro & Zartman*, 823 P.2d at 124. It operates to include certain persons under the Act (though for a limited purpose); it does not exclude from the Act's coverage a method commonly used to collect a debt. As the Third Circuit explained in *Piper*,
>
>> [e]ven though a person whose business does not primarily involve the collection of debts would not be a debt collector for purposes of the Act generally, if his principal business is the enforcement of security interests, he must comply with the provisions of the Act dealing with non-judicial repossession abuses. Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating

> with debtors in an effort to secure payment of debts.
>
> *Piper*, 396 F.3d at 236. And, in the words of the Fourth Circuit, "[t]his provision applies to those whose only role in the debt collection process is the enforcement of a security interest." *Wilson*, 443 F.3d at 378.
>
> Other than repossession agencies and their agents, we can think of no others whose only role in the collection process is the enforcement of security interests. A lawyer principally engaged in mortgage foreclosure does not meet this criteria, for he must communicate with the debtor regarding the debt during the foreclosure proceedings, regardless of whether the proceedings are judicial or non-judicial in nature. See, e.g., Mich. Comp. Laws § 600.3205a(1) (requiring the foreclosing party to serve on the borrower before commencing a foreclosure-by-advertisement a written notice containing information about the underlying obligation and stating how to avoid foreclosure); Tenn.Code Ann. § 35–5–101(e) (same); *cf. Reese*, 678 F.3d at 1217 (noting that a foreclosure notice serves more than one purpose). *See also Shapiro & Meinhold*, 823 P.2d at 124 (noting that "attorneys are not exempt [from the Act] merely because their collection activities are primarily limited to foreclosures"). Not so for repossessors, who typically "enforce" a security interest—i.e., repossess or disable property—when the debtor is not present, in order to keep the peace.
>
> Finally, the fact that the only provision of the Act applicable to those who satisfy the third sentence in the definition (but not the first sentence) concerns non-judicial repossessions—precisely the business of repossessors—also suggests that the sentence applies only to repossessors. Indeed, all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved repossessors. . . . (704 F.3d at 463-4)

The court concluded: "For these reasons, we hold that mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a 'debt collector' must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he 'regularly' performs this function. . . ." (704 F.3d at 464)

Foreclosure should be covered – as noted by the Sixth Circuit, and is obvious from the correspondence sent by the defendant in this action, mortgage lenders and servicers are interested in acquiring the consumer's money, not the consumer's real estate – regardless of whether there is personal liability. We have rarely seen foreclosure not accompanied by some effort to modify, restructure, induce sale, or otherwise collect money from the homeowner, and this case is no exception. Section 1692f(6) is not an exception to the definition of debt collector, but brings within the FDCPA for limited purposes repossessors of vehicles and similar collateral who try not to have any contact with the debtor.

The Second Circuit has applied the FDCPA to various attempts to enforce mortgage loans, *Hart v. FCI Lender Services, Inc.*, 797 F.3d 219 (2d Cir. 2015)(improper notice); *Vincent v. The Money Store*, 736 F.3d 88 (2d Cir. 2013) ("breach letters" sent as "prerequisite before mortgage lenders like The Money Store can foreclose on a borrower's property" are covered by FDCPA); *Gabriele v. Home Mortg. Servicing*, 503 Fed. Appx. 89 (2d Cir. 2012) (state procedural technicalities do not violate the FDCPA); *Roth v. CitiMortgage, Inc*., 756 F.3d 178 (2d Cir. 2014)(not subject to FDCPA where no allegation that mortgage was aquired after default); *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86 (2d Cir. 2016)(FDCPA applies to foreclosure activities post bankruptcy).

Furthermore, defendant's reasoning is similar to that rejected in *Romea*, 163 F.3d at 116, where the defendant claimed that an attorney who regularly served the three-day notice that is required by New York law as a condition precedent to a summary eviction proceeding was not subject to the FDCPA because it "was sent in connection with a possessory in rem action under Article 7 of the New York Real Property Actions and Proceedings Law" (163 F.3d at 116) "Heiberger asserts that the purpose of the Article 7 process is not debt collection, but rather 'a means of quickly adjudicating disputes over rights of possession of real property.' Heiberger maintains that the matter of the rent owed by the tenant is 'incidental' to the summary proceeding's primary purpose, that of regaining possession of the premises." (*Id.*)

Rejecting this argument, the Court of Appeals held: "[A] tenant can avoid the eviction proceeding by paying the owed rent. Although Heiberger is correct that the notice required by §711 is a statutory condition precedent to commencing a summary eviction proceeding that is possessory in nature, this does not mean that the notice is mutually exclusive with debt collection." (*Id.*) Similarly, in this case either Ms. Carbone – who can be deprived of her home unless she comes up with money – or Mr. Carbone – who is personally liable – can avoid the foreclosure by paying money. *See Hooks v. Forman Holt Eliades & Ravin LLC*, 11 Civ. 2767, 2015 WL 5333513, *10 (S.D.N.Y., Sept. 14, 2015)(pre-foreclosure letter), noting that both eviction and foreclosure notices are intended to induce the recipient to pay money and avoid the loss of property. *Accord, Rinaldi v. Green Tree Servicing LLC,* 14cv8351, 2015 WL 5474115 (S.D.N.Y., June 8, 2015) (following *Glazer*).

Defendant relies on *Boyd v. J. E. Robert Co.*, No. 05-CV-2455 (KAM) (RER), 2013 WL 5436969 (E.D.N.Y., Sept. 27, 2013), which held that the foreclosure of a tax lien without seeking a personal deficiency was not "debt collection" on the theory that "if the enforcement of a security interest was synonymous with debt collection, the third sentence [of 15 U.S.C. §1692a(6)] would be surplusage because any business with a principal purpose of enforcing security interests would also have the principal purpose of collecting debts. Therefore, to avoid this result, the court determines that the enforcement of a security interest, including a lien foreclosure, does not constitute the 'collection of any debt.'" This reasoning is seriously flawed because, as pointed out in *Glazer*, there is a large class of security interest enforcers – repossessors of automobiles and similar collateral – whose principal business is the enforcement of security interests without contact with the debtor; indeed, who prefer to operate in the dead of night in order to avoid such contact. The existence of the third sentence thus does not mean that persons who ***both*** enforce security interests ***and*** communicate with the consumer seeking money, and who would prefer payment of money to the taking of the property – such as defendant and others engaged in the foreclosure of mortgages – are not engaged in debt collection.

Defendant also cites decisions in two *pro se* cases, *Derisme v. Hunt Leibert Jacobson P.C.,* 880 F.Supp.2d 311 (D.Conn. 2012), and *Beadle v. Haughey*, 04-272, 2005 WL 300060 (D.N.H., Feb. 9, 2005), which are contrary to the more recent appellate decisions on point and concluded that prosecuting a foreclosure action without filing a motion for a deficiency judgment (*Derisme*) or pursuing a nonjudicial foreclosure (*Beadle*) is not "conduct related to the collection of money." (*Derisme*, 880 F.Supp.2d at 326) This not only presumes that mortgage companies want to acquire real estate rather than money, but ignores the fact that the foreclosure sale establishes the amount of any deficiency. Surely a debt collector could not avoid complying with the FDCPA by first asking for a declaratory judgment specifying the amount due and then asking for a money judgment.

Both landlords and mortgage companies want money, not vacant real estate. This is obvious from the correspondence involved in this case, in which defendant repeatedly seeks money from plaintiff. There is no reason to treat the correspondence at issue in this case from any other correspondence seeking money on account of a consumer debt.

VII. A "NOTICE OF DEBT" THAT DOES NOT CLEARLY STATE THAT A DISPUTE CAN BE ORAL BUT THAT A WRITTEN DISPUTE IS REQUIRED TO OBTAIN VERIFICATION VIOLATES THE FDCPA

Defendant claims that the FDCPA is not violated by a letter that "notifies a recipient that they may request validation of a debt without requiring a written request"(Def.Mem., p. 16) because it was just "making it easier for her to request information about the loan." (Def.Mem., p. 17) The flaw in this reasoning is that a written request is essential to exercise one's legal right to verification of the debt. Compliance with an oral request is optional. Compliance with a written one is not. If the consumer makes an oral request and allows the 30 days to expire without a written request, the consumer has forfeited her statutory rights.

Section 1692g requires three disclosures: ". . . (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;" "(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector;" and "(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor." Thus, the consumer may dispute the debt orally, and an oral dispute has certain consequence, such as that the collector must report the debt to any credit bureau as disputed. *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st. Cir. 1998). However, if the consumer wishes to obtain verification, or the name and address of the original creditor, he must write. The FDCPA "assigns lesser rights to debtors who orally dispute a debt and greater rights to debtors who dispute it in writing." *Camacho v. Bridgeport Financial Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).

The failure to inform the consumer that a dispute must be in writing to obtain verification has uniformly held to be a violation of §1692g. *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 217 F. Supp. 2d 336, 340 (E.D.N.Y. 2002) ("WEMED's validation notice only requires the consumer to notify the firm that she disputes the debt or requests the name and address of the original creditor. The letter does not mention that the notice be in writing. Any consumer, not simply the least sophisticated consumer, who read this letter would not know that to secure her right to obtain verification of the debt and the identity of the original creditor, her dispute of the debt and request for the identity of the original creditor must be in writing," rejecting debt collector's argument that it would have honored an oral request); *Nero v. Law Office of Sam Streeter*, 655 F.Supp.2d 200, 206 (E.D.N.Y. 2009) ("the validation notice clearly omitted an important term – that the consumer must inform the debt collector in writing to be entitled to verification of the debt. It makes no difference whether Streeter Law would have honored an oral request. . . . debt collectors have no duty to honor oral requests"); *McCabe v. Crawford & Co.*, 272 F.Supp.2d 736, 742–44 (N.D.Ill. 2003) ("by omitting the words 'in writing,' Crawford did not effectively convey to the consumer his rights under the FDCPA and thus violated the Act"); *Crafton v. Law Firm of Jonathan B. Levine*, 957 F.Supp.2d 992, 998 (E.D.Wisc. 2013) ("the failure to include the 'in writing' notice violates the FDCPA"); *Bicking v. Law Offices of Rubenstein and Cogan*. 783 F.Supp.2d 841, 844–46 (E.D.Va. 2011) ("all of them have held that a debt collector's failure to include the 'in writing' requirement violates subsections (a)(4) and (5) of Section 1692g"); *Beasley v. Sessoms & Rogers, P.A.*, No.

5:09–CV–43–D, 2010 WL 1980083, at *6–7 (E.D.N.C., Mar. 1, 2010) ("the failiure to tell consumer that she must notify the debt collector 'in writing' of the dispute states a claim under section 1692g(a)(4)"); *Carroll v. United Compucred Collections, Inc.,* No. 1-99-0152, 2002 WL 31936511, *8 (M.D.Tenn., Nov. 15, 2002) (report and recommendation) ("it is only a written dispute or request that impels the debt collector to respond in the statutorily required manner. . . . if a debt collector's action is only invoked by the written submission from the debtor, the debtor must necessarily be informed of that requirement"), adopted in pertinent part, 2003 WL 1903266 (M.D.Tenn., Mar. 31, 2003), aff'd, 399 F.3d 620 (6th Cir. 2005); *Osborn v. Ekpsz, LLC*, 821 F.Supp.2d 859, 870 (S.D. Tex. 2011) ("Every district court to consider the issue has held that a debt collector violates §1692g(a) by failing to inform consumers that requests under subsections (a)(4) and (a)(5) must be made in writing. . . . "); *Chan v. North Am. Collectors, Inc.*, No. C 06–0016 JL, 2006 WL 778642, at *6 (N.D.Cal. Mar. 24, 2006) "by omitting the words 'in writing,' [debt collector] did not effectively convey to the consumer his rights under the FDCPA and thus violated the Act"); *Hernandez v. Guglielmo*, 977 F.Supp.2d 1054, 1057 (D.Nev. 2013) ("it was insufficient for defendant Guglielmo to merely provide the option to pliantiffs to dispute a debt or request creditor identity information by either oral or written means").

VIII. DEFENDANT'S OTHER ARGUMENTS FOR DISMISSING COUNT II ARE MERITLESS

A. THERE IS NO BASIS FOR DISMISSING PLAINTIFF'S §1692g CLAIM ON THE THEORY THAT IT WAS NOT INTENDED TO BE A "NOTICE OF DEBT"

Defendant relies on this Court's decision in support of its arguement that FAC Ex. E was not intended to be a §1692g "notice of debt" and that if §1692g does not apply to the document, §1692e cannot be applied to it, either. However, FAC Ex. E contains in bold print what is obviously meant to be a §1692g "notice of debt". The fact that it is defective does not mean that it is not a §1692g notice.

Defendant's denial that the notice is what it purports to be is a best question of fact, which defendant is not entitled to raise on a 12(b)(6) motion.

Additionally, the argument does not benefit defendant – defendant was required to comply with §1692g because a person whose home is collateral for loan is "obligated" to pay it. Defendant's claim that it did not comply with §1692g at all means that it is liable, not that it escapes liability.

B. THERE IS NO BASIS FOR FINDING THAT §1692e DOES NOT APPLY

Finally, defendant asserts, that a misleading "notice of debt" is not actionable under §1692e. The FDCPA was intended to be liberally construed in favor of the consumer to effectuate its purposes. *Cirkot v. Diversified Fin. Services, Inc.*, 839 F. Supp. 941 (D. Conn. 1993). In accordance with this policy, if conduct is challenged under multiple FDCPA provisions and one is found inapplicable due to standing requirements, suit may be brought under the ones that are applicable. *Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C.*, 99 Civ. 3227, 2000 WL 1448635, *5 (S.D.N.Y. Sept. 28, 2000), aff'd, 155 Fed.Appx. 10 (2d Cir. 2005) (where conduct allegedly violated both FDCPA provisions limited to a "consumer" and other provisions, the "consumer" requirement is not somehow imported into the provisions that are not so limited); *Johnson v. PMAB, LLC*, 3:11cv111, 2012 WL 1379843 (W.D.N.C., April 20, 2012) (conduct challenged under §1692c and §1692d; court held that §1692c did not apply because plaintiff was not a "consumer" but submitted the case to the jury under §1692d). The purpose of multiple, overlapping provisions was to maximize consumer protection, not minimize it.

IX. CONCLUSION

For the reasons stated, the Court should deny defendant's motion to dismiss Plaintiff's Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Tiffany N. Hardy, hereby certify that on November 28, 2016, a true and accurate copy of the foregoing document was filed via the Court's CM/ECF system and notification of such filing was sent to the following parties:

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